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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANGELA MARINO, Defendant and Appellant.	B290954 (Los Angeles County Super. Ct. No. PA090589)

APPEAL from an order of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Angela Marino pleaded no contest to driving or taking a vehicle without the owner's consent after suffering a prior conviction. The victim, David Amiel, was reimbursed by his insurance company for the loss of the vehicle, which was later recovered and turned over to the insurance company. At the restitution hearing, the trial court ordered appellant to pay the full value of the vehicle in direct restitution to the victim. Appellant argues the trial court abused its discretion by ordering full restitution because the victim had been compensated for the loss by his insurance company, resulting in an impermissible double recovery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with two counts of theft of identifying information with a prior (Pen. Code, § 530.5, subd. (c)(2))[1] and one count of driving or taking a vehicle without consent with a prior (§ 666.5). Appellant pleaded no contest to the charges and admitted two prior prison terms (§ 667.5, subd. (b)). The trial court denied probation and sentenced appellant to three years in state prison.[2]

Amiel testified at the restitution hearing in June 2018. His 2011 Honda Insight was stolen between December 21 and December 22 of 2017. He reported the loss to his insurance company, which valued the vehicle at $6,740.18. After 30 days, the insurance company deemed the missing vehicle a total loss and paid Amiel the value of the vehicle, minus a $500 deductible. Amiel transferred title to the vehicle to the insurance company. He received no reimbursement from appellant or her insurance company.

Sometime in March 2018, the vehicle was recovered and Amiel retrieved it from the tow yard, paying a $317 towing fee. He turned the vehicle over to his insurance company.

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1 All further unspecified references are to the Penal Code.

2 One of the counts for theft of identifying information was dismissed pursuant to the plea agreement, and the trial court did not impose a sentence on the two prison priors.

The court admitted into evidence the "Request for Restitution" Amiel had prepared in April 2018, requesting restitution in the amount of $7,057.18, consisting of the value of the vehicle plus the towing fee. The "Vehicle Condition" section, which provided for "the results of the appraiser's inspection of [the] vehicle" and its impact on the vehicle's value, was blank.

Relying on section 1202.4, subdivision (f), *In re Brittany L.* (2002) 99 Cal.App.4th 1381 (*Brittany*) and *People v. Birkett* (1999) 21 Cal.4th 226 (*Birkett*), the prosecutor argued that Amiel was entitled to full restitution for his loss, regardless of the reimbursement from the insurance company. Defense counsel argued that "the victim in [this] case actually did have the car returned to him. He went to the tow yard, he picked up the car . . . the car was stolen; the car was recovered; he was given money for the car." Both the insurance company and Amiel had already been "[made] whole." Thus, defense counsel argued, appellant was responsible only for the cost of the deductible and the towing fee.

The trial court awarded Amiel $6,740.18 for the value of the car and $317 for the towing fee. It ruled that "[t]he purpose of a criminal restitution order is to fix the amount of the loss to the victim without any reference to insurance, so [as] not to punish the victim for having the insurance or to reward a defendant for being lucky enough to have a victim that has insurance." Furthermore, "[a]nything that happens after that between Mr. Amiel and his insurance company is not relevant to what we're doing [at the restitution hearing]." Appellant timely appealed.

DISCUSSION

A. Standard of Review

We review a restitution order for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) A court abuses its discretion only if its decision is arbitrary or capricious, or based on a demonstrable error of law. (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.) We affirm the order if there is a factual and rational basis for the restitution award. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.)

B. Governing Principles

Victims of crime have a state constitutional right to restitution for losses resulting from criminal acts against them. (Cal. Const., art. I, § 28, subd. (b)(13)(A).) The Legislature has implemented this right through section 1202.4, which provides for restitution directly from the defendant convicted of a crime to the victim who incurs any economic loss as a result of the crime. (§ 1202.4, subd. (a)(1).) The victim must be reimbursed the "[f]ull or partial payment for the value of stolen or damaged property," measured by either "the replacement cost of like property, or the actual cost of repairing the property when repair is possible." (§ 1202.4, subd. (f)(3)(A).) "Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of a third party. . . ." (§ 1202.4, subd. (f)(2).)

Payments made to the victim by the victim's own insurance company – or another collateral source independent of the defendant – for economic losses attributable to the defendant's criminal conduct do not offset the defendant's restitution obligation. (*People v. Hume* (2011) 196 Cal.App.4th 990, 996 (*Hume*) [defendant charged with embezzlement not entitled to offset in restitution award to victims for reimbursement obtained from state bar fund].) The victim must be fully compensated for his or her economic losses, even if the restitution order results in a double recovery. (*Birkett, supra,* 21 Cal.4th at pp. 246-248 [reversing order to divert portions of restitution award from victims of auto theft to victim's insurers, because "victim was entitled to receive from the probationer the full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses"]; *Brittany, supra,* 99 Cal.App.4th at p. 1389 [applying *Birkett* and finding error in trial court's refusal to "'fully reimburse'" victims of felony vandalism for "all proven losses they sustained" to their property, "whether or not already reimbursed by their insurer"]; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272 (*Hove*) [defendant charged with driving under the influence required to pay full restitution for injuries incurred by his crime, despite "fortuity" that victim was over 65 years old and medical expenses were covered by Medicare and Medi-Cal].)

"[A]lthough a restitution order is not intended to give the victim a windfall [citation], a third party source which has reimbursed a direct victim for his or her loss may pursue its civil remedies against the victim or perpetrator. '[T]he possibility that the victim may receive a windfall because the third party fails to exercise its remedies does not diminish the victim's right to receive restitution of the full amount of economic loss caused by the perpetrator's offense.' [Citation.]" (*Hume, supra,* 196 Cal.App.4th at p. 996, italics omitted; accord, *Birkett, supra*, 21 Cal.4th at p. 246 ["private insurers, who had already reimbursed the victim[,] were thus left to their separate civil remedies, if any, to recover any such prior indemnification either from the victim or from the probationer"]; *Hove, supra*, 76 Cal.App.4th at pp. 1272-1273 [finding restitution order proper "even though the victim had no direct economic losses, and even though the victim could conceivably profit from recovering restitution if defendant complies with the restitution order and if Medicare and/or Medi-Cal does not pursue reimbursement"].) Thus, criminal restitution compensates the victim for all economic losses without regard to duplicative reimbursement from the victim's own insurer, which can pursue its own civil remedies against the victim or defendant.

C. No Abuse of Discretion in Ordering Full Restitution

Appellant argues the trial court erred when it ordered appellant to pay full restitution for all economic losses Amiel incurred, because he had already been reimbursed the fair market value of the vehicle by his insurance company. Thus, appellant contends the restitution award "for the value of the undamaged vehicle constituted an impermissible windfall," and should be reduced to cover only the $500 deductible and the $317 towing fee.

Appellant disregards settled statutory and case law that establishes a victim's entitlement to full restitution regardless of any reimbursement obtained from a "third party." (§ 1202.4, subd. (f)(2).) Although appellant attempts to distinguish *Birkett* and *Brittany*, the legal principles applied there are broadly applicable and dispositive here. (See *Hove, supra*, 76 Cal.App.4th at p. 1271 [applying "dispositive" reasoning of *Birkett*, although *Birkett* was not "direct authority" because of contextual differences].) Unlike *Birkett*, the restitution award at issue was not divided between the victim

and his insurer, but the *Birkett* court's ruling was not limited to that context and encompassed a more comprehensive rule: "the Legislature intended to require a probationary [or nonprobationary[3]] offender, for rehabilitative and deterrent purposes, to make full restitution for all losses his crime had caused, and that such reparation should go entirely to the individual or entity the offender had directly wronged, regardless of that victim's reimbursement from other sources." (*Birkett, supra*, 21 Cal.4th at p. 246, italics omitted.) *Birkett* contemplated the possibility of a victim's double recovery to the extent the victim's insurer failed to exercise its right to seek reimbursement from the victim through civil remedies. (*Birkett, supra*, 21 Cal.4th at p. 246.)

Contrary to appellant's contention, it is of little consequence that the property in *Brittany* was not stolen or of a recoverable nature. *Brittany* relied on *Birkett* principles when it ordered full restitution for damage caused to the victims' home and driveway, and considered the possibility of the victims' duplicative recovery when it held that full restitution was appropriate regardless of potential recovery from their insurer. (*Brittany, supra*, 99 Cal.App.4th at pp. 1384, 1387-1388, 1389-1390.) Furthermore, both *Birkett* and *Brittany* were guided by section 1202.4, which broadly orders restitution in "every case in which a victim has suffered economic loss as a result of the defendant's conduct," regardless of the type of injury suffered or the nature of the property lost or damaged. (§ 1202.4, subd. (f).) Thus, settled law establishes that a victim may conceivably profit from a restitution order when the victim's insurer has reimbursed or will reimburse the victim for economic losses: "'[t]he possibility that the victim may receive a windfall because the third party fails to exercise its remedies'" does not reduce the victim's entitlement to full restitution. (*Hume, supra,* 196 Cal.App.4th at p. 996.)

The trial court did not abuse its discretion in finding Amiel was entitled to full restitution, including the fair market value of the vehicle, regardless of any insurance coverage. Appellant points out that "both the

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[3] See *People v. Hamilton* (2003) 114 Cal.App.4th 932, 941, footnote 9: "Amendments to the statute after [*Birkett*] indicate the Legislature intended the same rehabilitative and deterrent purposes to apply to non-probationary offenders as well. [Citations.]."

victim and the insurance carrier . . . had already been compensated for the economic loss at the time of the restitution hearing," and thus "Amiel's carrier had no right to subrogation, resulting in a double recovery for Amiel." Furthermore, she asserts that the vehicle was recovered in an "undamaged" condition. However, we find no indication in the record that the vehicle was recovered in an "undamaged" condition. The only evidence submitted at the hearing was the "Request for Restitution," which left the "Vehicle Condition" section blank. There was no evidence that the vehicle's condition was assessed for damage, or that its value matched the fair market value paid to appellant before its recovery. (See *People v. Baker* (2005) 126 Cal.App.4th 463, 468 [restitution appropriate where victims' stolen cattle were returned to victims, but were no longer "the 'same'"].) Regardless, as the trial court correctly observed, whether the insurer subsequently exercised its civil remedies, or Amiel received a double recovery, was irrelevant to the court's determination that Amiel was entitled to full restitution from appellant for his economic losses. We find no abuse of discretion.[4]

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[4] Appellant's reliance on *People v. Chappelone* (2010) 183 Cal.App.4th 1159 (*Chappelone*) is misplaced. In *Chappelone*, the appellate court reversed as an improper windfall a trial court's restitution award to a department store based on the full retail value of the stolen merchandise, which was mostly damaged and unsellable to begin with. (*Id.* at p. 1173.) The award "was not reflective of [the merchandise's] [actual] value" to the store, and should have been based on the "'replacement cost of *like* property.'" (*Ibid.*; see also *id.* at pp. 1176-1177.) Furthermore, the trial court in *Chappelone* had wrongfully ordered the merchandise be returned to the store, which ultimately donated the merchandise at a total loss: "a victim is not entitled to restitution for the value of property that was returned to him or her, except to the extent there is some loss of value to the property." (*Id.* at pp. 1168, 1180.) In contrast, the restitution award here was based on the fair market value of the vehicle, and was not an improper windfall. Amiel did not regain ownership of the vehicle when it was recovered, because he had already transferred title to the insurance company, and thus was not precluded from restitution. The *Chappelone* court was not concerned with the main issue on appeal here: whether the victim was entitled to restitution when he had already received compensation from his insurer.

DISPOSITION

The restitution order of the trial court is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.